

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS;

IN RE:)	In Proceedings
)	Under Chapter 7
KINCAID VILLAGE MARINA)	
CORPORATION,)	No. BK 84-40238
)	
Debtor(s).)	
DALE PETERS and JIM GIBBS,)	
as assignees of)	
GIBSON D. KARNES,)	
Trustee in Bankruptcy,)	
)	
Plaintiff(s),)	
)	
v.)	ADVERSARY NO.
)	87-0013
WILLIAM R. WILLIAMS,)	
)	
Defendant(s).)	

O R D E R

This matter is before the Court on the Motion to Amend Complaint of plaintiffs, Dale Peters and Jim Gibbs, and the objection thereto of defendant, William R. Williams. The facts relevant to the instant dispute are as follows:

On August 10, 1984 Kincaid Village Marina Corporation (hereinafter, debtor) filed its petition for reorganization under Chapter 11 of the Bankruptcy Code. Thereafter, on October 21, 1985, the case was converted to a proceeding under Chapter 7 of the Bankruptcy Code.

On January 20, 1987, the Chapter 7 Trustee filed his Complaint to Set Aside Post-Petition Transfers pursuant to 11 U.S.C. §549. The trustee's complaint alleged that as of May 10, 1985, when defendant, without court order, operated the business of debtor and

went into possession of its assets, he received post petition transfers of money and property from debtor valued in excess of \$100,000.00. On February 19, 1987, defendant filed his Answer to the Complaint. Thereafter, discovery was completed and a trial date was set for June 9, 1987.

On June 5, 1987, the trustee and defendant filed a Motion seeking the Court's approval of their compromise and settlement of the above-described cause of action for the sum of \$7,000.00. Upon notice of the motion to all creditors and other parties in interest, the plaintiffs herein objected to the proposed compromise.

Accordingly, on September 1, 1987, the trustee, with court approval, and without objection from defendant, or from any other party, conducted a sale of the cause of action to the highest and best bidder. Plaintiffs herein purchased the trustee's cause of action against defendant for the sum of \$8,000.00. The Court's Order approving the sale to plaintiffs was entered on October 8, 1987. The Order provided, in pertinent part:

A. That the Trustee may proceed to sell and transfer all of the estate's interest in and to its cause of action against the said William Williams arising out of the Defendant's operation of the marina known as Kincaid Village Marina Corporation from May 10, 1985 including the estate's interest in all discovery material obtained by the Trustee in the course of said proceeding.

B. That for the purposes of said action which is now pending, to-wit Adv. No. 87-0013, that Dale Peters and Jim Gibbs shall be the Assignees and Plaintiffs in said action against William Williams and shall have all of the rights, powers, duties and obligations arising from said lawsuit.

Thereafter on January 25, 1988, the Court, without objection by the defendant, entered its Order substituting plaintiffs as the real parties in interest in the proceeding and reopening discovery.

At the pretrial conference on February 17, 1988, the parties agreed to a trial date of June 7, 1988. Plaintiffs then moved to amend their Complaint to plead a second count in the alternative pursuant to 11 U.S.C. §363(c)(1). Proposed Count II alleged that on or about May 10, 1985, defendant, with authorization from the debtor, but without court approval, began to operate debtor's business and conduct its affairs, including making significant business decisions without court order. According to plaintiff's Complaint, as a result of said operation, defendant received property of the debtor in excess of \$100,000.00 that belonged to the bankruptcy estate. Count II further alleged that the decision to place defendant into possession of debtor's assets was a transaction which was not in the ordinary course of business and, thus, which was not permitted under §363(c)(1). Plaintiffs prayed in Count II for a judgment in excess of \$100,000.00 and for an accounting by defendant of his financial activities from May 10, 1985 to June 10, 1986.

The Court heard oral argument on the Motion to Amend Complaint on February 17, 1988, and thereafter, defendant, on February 26, 1988, filed his response objecting to the Motion to Amend the Complaint. On March 1, 1988, plaintiffs filed their reply.

Rule 15 of the Federal Rules of Civil Procedure governs the amendment of pleadings in adversary proceedings in this Court. Bankruptcy Rule 7015. Rule 15(a) provides for amendment as a matter of

right under circumstances which do not apply in this case. In all other situations, "a party may amend his pleading only by leave of court or by written consent of the adverse party...." Fed.R.Civ. P. 15. However, "leave shall be freely given when justice so requires." Id. In the instant case, defendant has objected that amendment of the complaint will be prejudicial to him. Therefore, it is left to the Court to decide whether justice demands that leave to amend be granted.

Defendant's first argument opposing amendment is that the assigned lawsuit encompassed solely a cause of action or theory of recovery claiming post petition transfers voidable under 11 U.S.C. §549. Therefore, according to defendant, granting the motion to amend the complaint would give plaintiffs more than they were assigned. However, this Court's Order of October 8, 1987, entered without objection by defendant, transferred all of the rights, powers and interest of the bankruptcy estate in the lawsuit to plaintiffs. It transferred to plaintiffs the cause of action "arising out of the Defendant's operation of the marina from May 10, 1985...." Thus, rather than limiting the cause of action to an avoidance of post petition transfers pled under 11 U.S.C. §549, the Court's Order is more expansive. Its language is clearly broad enough to include plaintiffs' proposed Count II which alleges that defendant's operation of the marina and possession of its assets under authority from debtor was a transaction outside the ordinary course of business.¹

¹Assuming arguendo that the assignment to plaintiffs did not encompass the allegations raised in proposed Count II, then the trustee would still be free to pursue this claim against defendant even if plaintiffs could not.

Defendant next argues that he will be prejudiced because the case was one week from trial, with discovery completed, and a settlement reached, when plaintiffs' objection led to bollixing of the settlement and to assignment of the lawsuit to plaintiffs. According to this argument since the trustee never moved to amend the complaint during the six months that he was plaintiff, plaintiffs cannot now do so.

However, upon consideration of plaintiffs' proposed Count II, it is apparent to the Court that plaintiffs do not seek by their amendment to add a new cause of action to the complaint. Rather, Count II merely attempts to add an alternate theory of recovery based on the same set of facts alleged in Count I. Thus, the amount of additional discovery, if any, necessary in conjunction with the proposed amended count will be limited, and any changes in defendant's strategy will be minimal. See, e.g., Lanigan v. LaSalle National Bank, 108 F.R.D. 660, 663 (N.D. Ill. 1985).

Moreover, Rule 15(a) requires that leave to amend be freely granted "when justice so requires" and the courts have consistently given liberal interpretation to this standard. E.g., Foman v. Davis, 371 U.S. 178, 182 (1962); Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1334 (7th Cir.), cert. denied, 434 U.S. 975 (1977); Lanigan v. LaSalle National Bank, 108 F.R.D. at 662. While the determination to grant or deny leave to amend is within the discretion of the trial court, outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Foman v. Davis, 371 U.S. at 182. It is only in

situations where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party..., futility of amendment, etc." that leave to amend should be denied. Id. The Court does not find that any of these conditions exist in the instant case.

Notably, although defendant argues prejudice, he has failed to point out to the Court even one example to show how prejudice will occur. While defendant is correct that the cause of action was ready for trial, with discovery completed, before it was assigned to plaintiffs, defendant never objected to the assignment of the lawsuit. Nor did he object to the reopening of discovery. In fact, the trial date, agreed to by defendant, is several months away on June 7, 1988. Thus, permitting the amendment will not delay the trial of the case. Additionally, the trial setting allows defendant ample opportunity to meet and defend against plaintiffs' newly advanced theory. Without more than bare allegations of prejudice to defendant, the Court must grant leave to amend.

Accordingly, plaintiffs' Motion to Amend Complaint is GRANTED and plaintiffs are given leave to file their amended complaint.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: March 31, 1988